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## Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes

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**FOREWORD:**  
**WHY POPULAR SOVEREIGNTY REQUIRES THE DUE PROCESS OF LAW  
TO CHALLENGE “IRRATIONAL OR ARBITRARY” STATUTES**

RANDY E. BARNETT\*

*ABSTRACT: So-called “substantive due process” has long been criticized progressives and conservatives as a contradictory interpretation of the Due Process Clauses, and one that undermines the popular sovereignty of We the People to govern themselves. In this Foreword, I explain why an individual conception of We the People, leads to a “republican” conception of popular sovereignty that requires a neutral magistrate to adjudicate whether a statute restricting the liberties of the We the People is within the just powers of a legislature to enact. Because a measure that is ultra vires is not truly “a law,” enforcing it against a fellow citizen and joint sovereign so as to deprive that person of his or her “life, liberty or property” violates what should be called the Due Process of Law Clauses. While the proper ends of Congress’s powers are enumerated in the text of the Constitution, the police powers of the states are more general. Still, the exercise of such powers to restrict the privileges or immunities of citizens in an “irrational or arbitrary” manner is beyond the just powers that a sovereign people can be presumed or supposed to have delegated to their servants in the legislature. Courts, who are also servants of the We the People, readily perform this type of evaluation when a “fundamental right” or “suspect class” is affected by the exercise of the police power, so such judicial engagement is well within their competence.*

Lee Optical of Oklahoma was a subsidiary of a Texas company that owned a national chain of eyeglass retailers doing business the way Lenscrafters does today. Lee Optical was founded by Theodore Shanbaum, whose parents were Russian immigrants who had settled in Chicago.<sup>1</sup> After graduating from the University of Chicago, he earned his law degree from DePaul in the late 1930s.<sup>2</sup> After visiting his brother-in-law, an optometrist, at his home in Dallas, Shanbaum got the idea of entering into the eyeglass industry himself.<sup>3</sup> To save money, he purchased a used business sign that said “LEE OPTICAL.” The name “Lee” had no other connection to the enterprise.<sup>4</sup>

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\* Carmack Waterhouse Professor of Legal Theory; Director, Georgetown Center for the Constitution. This Foreword was prepared for the Symposium on “Is the Rational Basis Test Unconstitutional?” Which was held at Georgetown Law on February 11, 2016 and co-sponsored with the Institute for Justice. Portions of this Foreword are drawn from Chapters 3 and 9 of RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016). I thank Alexa Gervasi for her assistance in preparing this Foreword.

<sup>1</sup> Obituary of Theodore Shanbaum, *Dallas Morning News*, October 6, 1999.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

It should come as no surprise that local ophthalmologists and optometrists were none too keen on this out-of-state competition advertising lower prices on glasses replaced without a new prescription the way LensCrafters does today. Indeed, most of the famous economic liberty cases involve legislation siding with some firms in competition with others.

- In the *Slaughter-House Cases*,<sup>5</sup> the statute gave special monopoly privileges to a single designated corporation at the expense of individual butchers.
- In *Lochner v. New York*,<sup>6</sup> the statute promoted by the bakeshop union favored union-organized bakeries at the expense of small, ethnic, nonunion bakeshops.
- In *Muller v. Oregon*,<sup>7</sup> white male union members were protected from competition from women.
- In *Nebbia v. New York*,<sup>8</sup> the regulation raising the retail price of milk sought to protect big milk distributors from competition from small mom-and-pop retailers in poor neighborhoods.
- In *U.S. v. Carolene Products*,<sup>9</sup> the statute protected the powerful dairy constituency from competition from lower-priced and better-tasting “filled” milk.

And these are just the famous “landmark” cases of economic regulation.

So it is unsurprising that the Oklahoma legislature passed a law banning opticians from providing certain eyeglass services in competition with ophthalmologists and optometrists, effectively making Lee Optical’s business plan illegal. What is surprising is that the federal district court upheld Lee Optical’s Due Process Clause challenge to the statute, though it was 1954 and well after the New Deal revolution. A three-judge panel agreed that the statutory scheme was irrational and arbitrary, and that none of the restrictions enacted could realistically be justified as genuine health and safety measures.<sup>10</sup>

In 1955, however, when the case reached the Warren Court, the justices reversed. In his opinion for the Court in *Williamson v. Lee Optical*,<sup>11</sup> Justice William O. Douglas finally adopted the extreme deferential standard that had been

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<sup>5</sup> 83 U.S. 36 (1873).

<sup>6</sup> 198 U.S. 45 (1905).

<sup>7</sup> 208 U.S. 412 (1908).

<sup>8</sup> 291 U.S. 502 (1934).

<sup>9</sup> 304 U.S. 144 (1938).

<sup>10</sup> For a description of how the lower court realistically assessed the statute before concluding it violated the Due Process Clause, see RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 234-41 (2016).

<sup>11</sup> *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

urged by James Bradley Thayer<sup>12</sup> and Oliver Wendell Holmes Jr.<sup>13</sup>—the formalist approach that even Justice Brandeis and his New Deal Court colleagues had declined to expressly adopt in *Caroline Products*.<sup>14</sup>

In this Foreword, I explain why the individual sovereignty of We the People, each and every one, requires the “due process of law,” which includes a process by which statutes and regulations restricting liberty may be challenged for being “irrational or arbitrary.” Such exercises of legislative power are beyond the “just powers” of a republican legislature to enact because the people cannot be presumed to have consented to being so governed.

### *The Limits of the “Consent of the Governed”*

As I explain in *Our Republican Constitution*,<sup>15</sup> from the early days of the American republic, the fundamental nature of our government has been disputed. This is because there are not one, but two conceptions of popular sovereignty, based on, not one, but two very different notions of “We the People.”

Some view “We the People” collectively, believing that popular sovereignty resides in the people *as a group*, which favors rule by today’s majority. Their vision of a good constitution is a living one, as the people should not be ruled by the dead hand of past majorities. Under this, what I call the “Democratic Constitution,” unelected judges are then seen as thwarting the “will of the People.”

Then there are those who view “We the People” individually, and who think popular sovereignty resides in the people *as individuals*. Their vision of government is not to reflect the will of the people—which in practice means the will of the majority—but to secure the pre-existing rights of We the People, each and every one of us. Under what I call the “Republican Constitution,” judges are seen as servants of the sovereign people who are tasked with protecting their liberties from majoritarian abuses by the subset of the people who are tasked with make laws for the common good.

In *Our Republican Constitution*, I describe these two competing conceptions of popular sovereignty based on two contrasting visions of “We the People,” and explain how the individualist conception of popular sovereignty is manifested in the Declaration of Independence’s famous declaration that: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty

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<sup>12</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893).

<sup>13</sup> *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting).

<sup>14</sup> I discuss the history of the rise, fall, and partial revival of judicial scrutiny in Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1481-1485 (2008).

<sup>15</sup> See generally BARNETT, *OUR REPUBLICAN CONSTITUTION* (contrasting the “republican” and “democratic” conceptions of We the People and popular sovereignty). .

and the pursuit of Happiness.”<sup>16</sup> It then affirmed “[t]hat to secure these rights, Governments are instituted among Men. . . .”<sup>17</sup>

Thus, under the Declaration’s view of republicanism, *first come rights and then comes government* “to secure these rights.” But that famous sentence then continues to describe governments as “deriving their just powers from the consent of the governed.”<sup>18</sup> This last passage of the sentence has proven to be problematic when combined with the first.

If the “consent of the governed” is taken to mean the consent of *a majority* of the people, then the “consent of the governed” can be used to violate the “unalienable rights” that “governments are instituted among Men” “to secure.” The situation is still worse if the consent of a majority of a small body of men and women called “legislators” and “representatives” is taken to be the same as the consent of the people themselves. The problem with the “collective” conception of popular sovereignty based on “the will of the people” is that it invites this majoritarian interpretation of the “consent of the governed.” For it would seem that the “will” of “We the People” could not be identified in any other way. After all, the citizenry will never be unanimous about anything.

Suppose, however, that the flaw in this reasoning is to insist that popular sovereignty entails rule by the people themselves. Rather, rule is by “governments...instituted among Men,” who are not to be confused with the people themselves. What the people must consent to is *the scheme of governance*, not to the individual laws that may be imposed upon them. And yet, each “joint sovereign” individual is never asked for his or her explicit consent even to that scheme. The Constitution itself was only ratified by a majority of elected delegates to state ratification conventions.

So how do we reconcile the individual conception of popular sovereignty based on the consent of each and every person with the fact that such unanimous consent to governance is never expressly solicited, and would be impossible to obtain? If the only reason “a free man is bound by human laws, is, that he binds himself,” as Justice James Wilson insisted in *Chisholm v. Georgia*,<sup>19</sup> in what sense can an individual who is never asked for his or her consent be said to have consented to be governed?

As it happens, there was an answer to this question that can also be found at the time of the founding and long before. If we start with the republican proposition that it is the people as individuals who are sovereign, and that they retain their preexisting rights while delegating powers to their agents, then, in the absence of such express consent, we must ask what each person could be *presumed* to have consented to.

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<sup>16</sup> Declaration of Independence. See also BARNETT, OUR REPUBLICAN CONSTITUTION, ch. 1.

<sup>17</sup> Declaration of Independence.

<sup>18</sup> *Id.*

<sup>19</sup> 2 U.S. 419 (1793); see also Randy E. Barnett, *We the People, Each and Every One*, 123 Yale L. J. 2576, 2596-602 (2014).

In his 1845 book, *The Unconstitutionality of Slavery*, radical abolitionist Lysander Spooner contended that, since the consent of the governed “exists only in theory,” the people cannot be presumed to have given up their preexisting rights.<sup>20</sup> “Justice,” he said, “is evidently the only principle that everybody *can be presumed* to agree to, in the formation of government.”<sup>21</sup> Although this is where I first noticed the concept, Spooner was far from the first to make this argument, which crops up in some interesting places.

In his *Second Treatise of Government*, John Locke observed that “men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require.”<sup>22</sup> He then considered the limit to the legislative or police power that is given up, employing an analysis based on “supposed” consent very similar to Spooner’s reference to “theoretical” consent:

[Y]et it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature *can be supposed* to change his condition with an intention to be worse) the power of the society, or legislative constituted by them, *can never be supposed* to extend farther, than the common good; but is obliged to secure every one’s property, by providing against those three defects . . . that made the state of nature so unsafe and uneasy.<sup>23</sup>

In the absence of any explicit consent from the individual, like Spooner, Locke asked what a “rational creature can be supposed” to have consented to when leaving the state of nature. And the individual can only be “supposed” to have consented to the *common* good, which consists of the protection of *each person’s* life, liberty, and property.

This idea of “supposed” or presumed consent appears again in an official opinion of our first attorney general of the United States, Edmund Randolph. President Washington had queried each member of his cabinet as to whether the Constitution gave Congress an implied power to incorporate a national bank.<sup>24</sup> In his opinion to the President, Randolph observed that a legislature governed by a written constitution without an express “demarcation of powers, may perhaps, *be presumed* to be left at large, as to all authority which is communicable by the people,” *provided* that such authority “does not affect any of those paramount rights, which a free people *cannot be supposed* to confide even to their

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<sup>20</sup> Lysander Spooner, *The Unconstitutionality of Slavery*, rev. ed. (1860), reprinted in *The Collected Works of Lysander Spooner*, vol. 4, ed. Charles Shively (Weston, MA: M&S Press, 1971), 225.

<sup>21</sup> *Id.* at 143 (emphasis added).

<sup>22</sup> John Locke, *Two Treatises of Government*, §131.

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> Edmund Randolph, “Opinion of Edmund Randolph, Attorney General of the United States, to President Washington,” in *Legislative and Documentary History of the Bank of the United States*, ed. M. St. Clair Clarke and D.A. Hall (New York, 1832), 86.

representatives.”<sup>25</sup> Once again, given the sovereignty of the people as individuals, the people cannot be “presumed” or “supposed” to have confided in their legislature any power to violate their fundamental rights.

But perhaps the most striking use of this notion of the presumed or supposed consent of the governed appears in the 1798 Supreme Court case *Calder v. Bull*.<sup>26</sup> *Calder* has become known for its clash between Justice Samuel Chase, who invoked “the great first principles of the social compact,” which he said restrict the “rightful exercise of legislative authority,”<sup>27</sup> and Justice James Iredell, who seemed to assert a far more unlimited and positivist conception of legislative power. Generally overlooked, however, is the fact that, like Locke, Randolph, and Spooner, Chase too employed the notion of supposed or presumed consent in assessing the proper scope of legislative power.

In a famous passage worth quoting in its entirety, Justice Chase began by observing that even state legislatures of *general* powers without expressed limits do not have *unlimited* power:

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, *although its authority should not be expressly restrained by the constitution or fundamental law of the state*. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. *The nature and ends of legislative power will limit the exercise of it*. . . . There are acts which the federal or state legislature cannot do without exceeding their authority.<sup>28</sup>

Chase then provided examples of legislative acts that violate these “great first principles,” such as a law “that punished a citizen for an innocent action,” or “a law that destroys, or impairs, the lawful private contracts of citizens,” or “a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.”<sup>29</sup> Such an “act of the legislature (*for I cannot call it a law*)” was beyond the legislative power, he said, because “[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed* that they have done it.”<sup>30</sup>

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<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> 3 U.S. 386 (1798).

<sup>27</sup> 3 U.S. at 388 (Chase, J.)

<sup>28</sup> *Id.* at 387-88 (emphases added).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (emphases added).

In other words, just because a legislature enacts a statute does not automatically make the statute *a law*. According to Chase, only laws that are consistent with the proper “ends of legislative power” for which men into society are properly called “law.” And a court may need to pass on the question of whether or not a statute is a product of a “rightful exercise of legislative power.” If it isn’t, then such a statute would deprive a person of life, liberty, or property without what the Fifth and Fourteenth Amendments call the “due process *of law*.” Even if it is enacted according to the established legislative procedures or “process,” a statute that exceeds the just powers of the legislature to enact cannot properly be considered a “law.” And, in the absence of his or her express consent, *no person can be presumed to have consented* to being deprived of his or her life, liberty or property except by a proper law. Like Locke, Chase asked whether, in the absence of a clear statement in a written constitution, a free and rational person could have consented to *that*.

Just seven years after *Calder*, Chief Justice John Marshall, in applying the Necessary and Proper Clause,<sup>31</sup> adopted a similar “clear statement rule” with respect to presumed legislative intent in the case of *U.S. v. Fisher*: “where fundamental principles are overthrown, when the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice *to suppose* a design to effect such objects.”<sup>32</sup>

To be sure, natural justice or natural rights lurk in the background of all these considerations of “presumed consent” by Locke, Randolph, Chase, Marshall and Spooner. But these rights are not identified and then directly protected as such. Instead, the prior existence of such rights justifies skepticism about the claim of implied legislative power in the absence of an *express* consent.

When combined with the concept of individual popular sovereignty, all these invocations of “presumed,” “supposed,” or “theoretical” consent cast the issue of popular sovereignty and the “consent of the governed” in a new light and support the approach to constitutional legitimacy I presented in *Restoring the Lost Constitution*.<sup>33</sup> The argument has the following steps:

- First, ultimate sovereignty rests not in the government, but in the people themselves, considered *as individuals*.
- Second, to be legitimate, the government must receive the consent of *all* these sovereign individuals.
- Third, in the absence of an express consent by each person, the only implied consent that can be attributed *to everyone* is a consent only to such powers that do not violate their retained fundamental rights.

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<sup>31</sup> See David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. Chi L. Rev. 887, 930-32 (1982) (contrasting Marshall’s treatments of “necessary and Proper” in *Fisher* and *McCulloch*).

<sup>32</sup> *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 358 (1805).

<sup>33</sup> See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY*, 2d. ed. (Princeton, NJ: Princeton University Press, 2014), 369.



- Fourth, the *equal protection* of these rights retained by the people is what assures them that the government is actually conforming to the consent that it claims to be the source of its just powers.
- Finally, only if such protection is *effective* will the commands of a legislature bind in conscience on the individual.

### *The Due Process of Law and Judicial Engagement*

In *Our Republican Constitution*, I explain how the structural features of federalism and the separation of powers in our Constitution are the first line of defense of the sovereignty of We the People.<sup>34</sup> Even here, however, an independent judiciary is needed to keep political actors within these structural restraints. Obtaining the benefits of federalism requires federal courts to develop doctrines that identify the outer limits of Congress's enumerated powers, as the Supreme Court was attempting, however imperfectly, to do before 1937, and has tepidly done since 1995. And the Court must overcome its reluctance to enforce the separation of powers within the federal government—a reticence that has undermined the rights of the sovereign people by allowing the rise of an executive-administrative state with the prerogative powers of a sovereign king.<sup>35</sup>

That a judiciary is needed to secure the structural features of the Constitution should not be surprising. Recall John Locke's assessment that the state of nature is so "unsafe and uneasy," in part because it lacks "a known and indifferent judge, with authority to determine all differences according to the established law."<sup>36</sup> This is because, when every person is "both judge and executioner of the law of nature," each "being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat, in their own cases."<sup>37</sup>

As with individuals, Congress should not be the judge in its own case about the extent of its powers, and the executive-administrative state has dangerously become the legislator, judge, and executioner of its own prerogative powers.<sup>38</sup> No one who views popular sovereignty as residing in the individual would confuse the people themselves with their representatives in the legislature—or with employees of administrative agencies—who are but men and women who may use their power to improperly restrain the liberties of the sovereign people.

Although an independent judiciary standing alone is not enough to secure the sovereignty of the people and is, in some sense, the last line of defense after the structural protections of federalism and separation of powers, judges have an

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<sup>34</sup> See BARNETT, *OUR REPUBLICAN CONSTITUTION*, ch. 6-8.

<sup>35</sup> *Id.* Ch. 8.

<sup>36</sup> Locke, *Two Treatises of Government*, §125.

<sup>37</sup> *Id.* at §124.

<sup>38</sup> See F. H. Buckley, *The Once and Future King: The Rise of Crown Government in America* (New York: Encounter Books, 2014); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

important role to play in our republican constitution. As Madison explained in *Federalist* 10, “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”<sup>39</sup> But he then added that the same precept applies to legislatures: “With equal, nay with greater reason, *a body of men* are unfit to be both judges and parties at the same time.”<sup>40</sup> Madison then observed that “many of the most important acts of legislation” function as “judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens.”<sup>41</sup>

According to Locke, the answer to this defect in the state of nature is the creation of an impartial judiciary. Or, as Madison put it in his speech to the House proposing a bill of rights, “independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution. . . .”<sup>42</sup>

As it happens, the right to a fair and impartial adjudication has been “expressly stipulated for” in the Constitution, not once, but twice. Among the express guarantees that were added to the Constitution is the Fifth Amendment, which says that no “person . . . shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>43</sup> Likewise, the Fourteenth Amendment says that no state may “deprive any person of life, liberty, or property, without due process of law.”<sup>44</sup>

Even when all the structural constraints are operating as designed—and especially when they aren’t—there remains a need for a “due process of law” to ensure that proper laws are applied properly to particular persons. But the “due process of law” also requires a forum in which citizens may contest whether their servants have exceeded their “just powers.” In this sense, a “Commerce Clause challenge” to the scope of Congressional power is also part of the “due process of law.” The same would be true for a “First Amendment challenge.”

The Commerce Clause provides, and the First Amendment reaffirms or declares, a substantive limit on legislative power, while the Due Process of Law Clauses either provide for (or reaffirm) a neutral magistrate to ensure that the agents or servants of the sovereign individuals who comprise We the People are not acting *ultra vires*. In such cases, we just see the Commerce Clause or First Amendment; we do not notice that the “due process of law” assures citizens the opportunity for their day in court when Congress has exceeded its power when restricting their liberties. Chase in *Calder* explains why the “of law” part of the Clauses matters.

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<sup>39</sup> James Madison, “Federalist #10,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 77

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *The Papers of James Madison*, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>.

<sup>43</sup> U.S. Const. amend. V.

<sup>44</sup> U.S. Const. amend. XIV.

Since the New Deal breached the enumerated powers scheme, judges began employing the two Due Process of Law Clauses to protect certain “preferred freedoms” or “fundamental rights.”<sup>45</sup> While some of these rights were enumerated in the text of the Constitution, others that were unenumerated have been selected by judges for special protection. This post-New Deal doctrine is then called “substantive due process” because, rather than ensuring a fair *process* by which the law is applied to particular persons, the “Due Process Clause” *by itself* is being used to limit the scope of the legislature’s power by protecting certain *substantive* rights, some of which are nowhere enumerated in the Constitution.

Judges and law professors today read this modern approach back into the Supreme Court’s use of the Due Process of Law Clause before 1937. Like modern courts, they say, in cases like *Lochner v. New York*<sup>46</sup> the pre-New Deal Supreme Court improperly elevated the substantive right of the “liberty of contract” to the status of a fundamental right. While today’s progressives on the left and “judicial conservatives” on the right all condemn this use of the Due Process of Law Clauses, they differ on why exactly it was wrong.

Like the New Deal justices who were dubbed “judicial activists” by Arthur Schlesinger Jr., modern progressives say the sin was not that the Court was using the Due Process of Law Clauses to protect “substantive” rights, but that it was protecting the *wrong* substantive rights. Like these old “activists,” progressives today say the problem is “not that the old Court engaged in judicial legislation, for this is inevitable,” but “that it engaged in *reactionary* judicial legislation.”<sup>47</sup> Because “the Court cannot escape politics...let it use its political power for wholesome purposes,”<sup>48</sup> such as protecting a right of privacy.

On the other side of the aisle, like the New Deal justices that Schlesinger dubbed “Champions of Self Restraint,” modern judicial conservatives object to using the Due Process of Law Clauses to thwart the will of the majority by protecting *any* unenumerated right—whether the liberty of contract or a right of privacy. By protecting unenumerated rights at all, they say, courts are engaged in judicial lawmaking rather than confining themselves to ensuring a process in which laws are fairly applied to particular individuals.

In this way, both today’s left and right are operating within the post-New Deal worldview. But this seriously distorts how the pre-New Deal Supreme Court was actually using the Due Process of Law Clauses. The pre-New Deal justices were not selecting certain “substantive” unenumerated rights and then elevating them for special protection. Instead, they viewed the “due process of law” as requiring a *procedure* by which a person who is deprived of his or her life, liberty, or property may challenge a law as outside the “just powers” of Congress or state legislators to enact.

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<sup>45</sup> See Barnett, *Scrutiny Land*, *supra* note 15, at 1480.

<sup>46</sup> 198 U.S. 45 (1905).

<sup>47</sup> Arthur M. Schlesinger Jr., “The Supreme Court: 1947,” *Fortune*, January 1947, 202.

<sup>48</sup> *Id.*

In other words, before sovereign individuals can justly be deprived of their “life” (by capital punishment), “liberty” (by imprisonment), or “property” (by penalty or fine), the “due *process* of law” entitles them to a judicial evaluation of whether a statute being enforced against them is within the “just powers” of Congress or state legislatures to enact. And the “due process *of law*” requires that such a statute be a “law.” As we saw above, thus did Justice Chase insist “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” Unless a statute is consistent with these principles for which “free republican governments” are established, it is not truly “a law” that is binding in conscience on the sovereign individual.

Under “the due process *of law*,” then, the *process* of applying a law to a particular *person* includes a fair opportunity to contest whether a statute (or administrative regulation) is within the “proper” or “just power” of a legislature to enact and therefore carries the obligation of a *law*. And, like a law that exceeds the commerce power of Congress, an irrational or arbitrary statute is not within the just powers of a republican legislature.

Crucially, the “due process of law” requires that the magistrate or judge hearing such a challenge be impartial. If the judge hearing a challenge simply “presumes” that the legislature is acting properly, or “defers” to the legislature’s own assessment of its powers, then that judge is not acting impartially. Even worse, if the “presumption” in favor of legislation is irrebuttable, then the person dressed in black robes is not acting as a judge at all.

When this happens, “fellow citizens and joint sovereigns”<sup>49</sup>—the term used by Chief Justice John Jay in *Chisholm*<sup>50</sup>—will be deprived of their “life, liberty, or property” without “the due process of law.” And without this aspect of the due process of law, the benefits of federalism, separation of powers, the freedom of speech, and all the other structural and substantive protections afforded by our Republican Constitution will be severely weakened or altogether lost. But what about the states?

### *“Irrational or Arbitrary” State Statutes*

The original Constitution placed very few limits on the scope of the legislative or “internal police” of the states. In *Calder*, Justice Chase was considering the proper scope of state legislative power because the case concerned one of these limits. Article I, Section 9 says: “No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant

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<sup>49</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793), at 479.

<sup>50</sup> *Id.* (“The extension of the judiciary power of the United States to such controversies [those between States and citizens of another State] . . . enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.”)

any title of nobility.”<sup>51</sup> Nevertheless, for Chase, this express limitation on state power merely confirmed the fundamental Republican principle that the people “cannot be presumed” to have delegated to their state legislatures a power to impose arbitrary or irrational restrictions on their natural liberties. Moreover, the Fourteenth Amendment provided a new republican check on state powers. Using wording deliberately mimicking Article I, Section 9, it commands: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>52</sup>

Of course, the scope of state legislative power differs from that of the national government. While Congress may legislate only to accomplish a specific list of objectives, state legislatures may pursue a much wider—and in important respects more fundamental—set of purposes. However, state legislatures are limited to enacting laws to pursue the common good in which each and every citizen partakes. Unlike the federal government, the states are charged with securing *all* the individual rights of the people from being violated domestically by their fellow citizens. Actions that violate any of the rights of others are not rightful exercises of liberty and may justly be prohibited. For this reason, murder, rape, robbery, theft and the like are punished by states rather than by the federal government.

The private rights retained by the people are threatened not only by such criminal acts as murder and theft, but by negligent and other risky conduct as well, which are traditionally governed by the law of torts. But states do not have to wait until after a tortious rights violation has been perpetrated. State legislatures can “regulate” conduct in advance to prevent the tortious rights violation from occurring in the first place. The shorthand expression to summarize the aspect of the police power is that it includes the power to regulate for the “health and safety” of the public. Or, as John Marshall put it *Gibbons v. Ogden*, “inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State” are reserved to the states.<sup>53</sup>

However, although the police powers of a state are more general than those of Congress, this does not mean that state legislative powers are unlimited. Such laws must be for the common good of We the People, each and every one. As I argued above, the “due process of law” includes an assessment by an impartial judiciary that a particular statute was indeed a *law* within the powers that a people may be presumed to have delegated to their agents in state legislatures. Like the federal government, a state must be exercising its “just powers.”

In the absence of a specific list of enumerated powers like the ones defining the scope of Congress’s power, how are the “just powers” of states to be identified and protected? For one thing, the Due Process of Law Clause of the Fourteenth Amendment only protects against a person being deprived of his life, liberty, or property. So when a government action is not depriving a person of any of these,

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<sup>51</sup> U.S. Const. art I, §9.

<sup>52</sup> U.S. Const. amend. XIV.

<sup>53</sup> 22 U.S. 1, 203 (1824).

he or she cannot object to that law in court, but must confine such objections to the political process. When this is the case, we say such a person lacks “standing” to sue. For example, a person cannot challenge the hours the postal service sets for its operation or myriad other regulations of government entities.

A Due Process of Law Clause challenge, then, arises only if a government is regulating, mandating or forbidding activity, the sanction for which is the deprivation of the life, liberty, or property of an individual. When (and only when) this has occurred, there is a two-step inquiry. First, is either the end or the means employed in the statute within the “just powers” of a republican government in a free society? In the absence of an express delegation, is it the sort of power that a free people can be presumed to have delegated to their agents? For example, is the purpose of the measure to protect the health and safety of the public? Or is it, for example, “a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B”?<sup>54</sup>

It cannot be enough that a legislature *claims* its acts are within one of its just powers. Such an inquiry must include the question of whether such an assertion is being made in good faith. As Chief Justice Marshall noted in *McCulloch*:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, *under the pretext of executing its powers*, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act *was not the law of the land*.<sup>55</sup>

Notice how, like Chase, Marshall identifies a law “for the accomplishment of objects not entrusted to the government” as “an act” that is “not the law of the land,” or simply *not law*.

To smoke out bad faith assertions of legitimate powers then requires a second step. Rather than directly assess the subjective motives of legislatures, a court should ascertain whether the means employed are *irrational* or *arbitrary* with respect to the end being asserted. For the people cannot be presumed to have “entrusted to the government” the power to irrationally or arbitrarily restrict their liberties. That a means employed is genuinely irrational or arbitrary with respect to its purported end “gives rise to at least a suspicion that there was some other motive

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<sup>54</sup> *Id.*

<sup>55</sup> *M’Culloch v. State of Maryland*, 17 U.S. 316, 423 (1819). Much later, this crucial portion of Marshall’s “canonical” opinion was gutted by the New Deal Court in *United States v. Darby Lumber Co.*, 312 U.S. 100, 115 (1941). (“*Whatever their motive and purpose*, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.” (emphasis added)).

dominating the legislature than the purpose to subserve the public health or welfare.”<sup>56</sup>

As the three-judge district court panel explained in *Lee Optical v. Oklahoma*, the “court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.”<sup>57</sup> The panel then defined this traditional standard as follows: when “the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accomplished and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other.”<sup>58</sup> Although the terms “irrational” and “arbitrary” are not always clearly distinguished, a measure that lacks “a reasonable relation to the purpose” can be said to be *irrational*; a measure that “discriminate[s] between two similarly circumstanced groups” can be said to be *arbitrary*.

So, if the claimed purpose of a statute is a proper one, we must next ask if the restriction on liberty is necessary to serve it. Strict logical necessity is not required, as that type of showing would undermine the purpose for which Republican “governments are instituted among men.”<sup>59</sup> But some degree of means-ends fit must be shown. Such a showing helps ensure that the restrictions were actually adopted as means to a proper end; and it guards against the very real risk that a restriction of liberty was adopted for an improper motive. At the same time it avoids the need for a judicial inquiry directly into the motive of particular legislators, though it does not hurt for courts to be generally aware of how such laws or regulations came to be.<sup>60</sup>

Laws that are irrational or arbitrary with respect to a just power were likely enacted to serve other improper ends or objects. Such improper ends include (a) the end of assisting favored persons or groups at the expense of other citizens, (b) the end of harming other individuals or groups, or (c) the end of stigmatizing or making more costly the exercise of a liberty of which some disapprove. In the absence of express consent, no citizen can be presumed to have consented to a lawmaking power with any of these as its ends.

Requiring the government to identify a proper end and then show that the means chosen are actually well suited to advance that end helps to smoke out illicit motives that the government is never presumed by a sovereign people to have authorized. If a law truly has an appropriate purpose, this should not be hard to establish. Such means-ends scrutiny is rather common in our constitutional history.

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<sup>56</sup> *Lochner*, 198 U.S. at 63.

<sup>57</sup> *M’Culloch*, 17 U.S. at 132.

<sup>58</sup> *Id.* at 134.

<sup>59</sup> Declaration of Independence.

<sup>60</sup> See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (acknowledging the background behind the government’s ban on animal slaughter when evaluating its rationality).

Consider the Court's analysis of a municipal ban on the slaughter and disposal of animals in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>61</sup> There the City of Hialeah purported to be exercising its police power to regulate the health and safety of the slaughtering of animals and their disposition. Clearly regulating such activity was within its police power. But the Court expressed its awareness of the process that led up to the enactment of the statute, in particular, that the members of the community were offended by the sacrificial use of animals by the Church of Lukumi Babalu Aye.

Still, the improper motive of suppressing the free expression of religion did not decide the case. Instead, with this background in mind, the Court realistically assessed the health and safety rationales advanced on behalf of the regulation and found the restrictions to be irrational and arbitrary. It offered this quote from Michael McConnell and Richard Posner: "[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it *arbitrarily* imposes greater costs on religious than on comparable nonreligious activities."<sup>62</sup>

After engaging in the realistic scrutiny of the health and safety rationales offered on behalf of the ordinance, the Court concluded that the ordinance had stemmed from the City's "animosity to religion or distrust of its practices," and affirmed that "[T]hose in office must be resolute in resisting importunate demands and must ensure that the *sole reasons* for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."<sup>63</sup>

Of course, it was only because it was a Free Exercise case that the Court scrutinized this economic regulation realistically to ensure it was not irrational or arbitrary. Yet the case still exemplifies how such a realistic inquiry can be conducted against a backdrop that suggests an improper motive without resting its conclusion on an assessment of legislative motivation. The problem is not that such scrutiny is infeasible, but that it is limited to a few exceptional circumstances.

Everyone now agrees that the Court in *Plessy v. Ferguson*<sup>64</sup> was wrong to accept a mere assertion of a public purpose to justify the economic regulation of street cars in New Orleans. But we go wrong today by limiting our skepticism to a situations involving a few "fundamental rights" or "suspect classes." *Whenever* the enforcement of a law deprives a fellow citizen and joint sovereign of his or her life, liberty, or property, the "due process of law" requires that such laws be skeptically assessed by an impartial judge to ensure that they actually do serve a proper governmental purpose. Under such an approach, a fellow citizen and joint sovereign need not be a member of a suspect class to be protected from irrational or arbitrary restrictions on his or her liberty.

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<sup>61</sup> 508 US 520 (1993).

<sup>62</sup> *Id.* at 561. (quoting Richard A. Posner & Michael McConnell, An Economic Approach to Issues of Religious Freedom, 56 U. Chi. L. Rev. 1, 35 (1989)).

<sup>63</sup> *Id.* at 547 (emphasis added).

<sup>64</sup> 163 U.S. 537 (1896).



That this can be a very powerful way for courts to protect liberty is shown by Clark Neily. In his book, *Terms of Engagement*,<sup>65</sup> Neily relates case after case of special interest legislation that was enacted not to advance the general welfare by protecting the health and safety of the public, but to benefit privileged existing economic interests at the expense of fledgling competition. In his book, Neily tells the stories of:

- The widow who was barred from arranging flowers for a grocery store because she lacked a license from the Louisiana Horticulture Commission, which was staffed by licensed florists and designed to limit competition. She died before her right to earn an honest living could be vindicated in court.<sup>66</sup>
- The licensed massage therapist who was ordered to desist from massaging horses because she was licensed only to provide human massage therapy.<sup>67</sup>
- The citizens who have been barred from African hair braiding without first obtaining a cosmetology license requiring two thousand hours of training on skills and knowledge that are entirely irrelevant to hair braiding.<sup>68</sup>
- How in Florida and two other states, one must have a college degree from an accredited interior design school, serve a two-year apprenticeship with a state-licensed interior designer, and pass a three-day, thousand-dollar licensing exam before you can arrange furniture.<sup>69</sup>

In each of these cases, the citizens were represented by the Institute for Justice, the public interest law firm for whom Neily works as a senior attorney. In each of these cases, the Institute showed that the public health rationale for the restriction was either sketchy or nonexistent. And he might also have included the story of the Benedictine monks of St. Joseph Abbey in Louisiana who were barred by the Louisiana State Board of Embalmers & Funeral Directors from selling caskets without a funeral home director's license.

In each of these cases, the prospect of vindicating the rights of the sovereign individual through the “democratic” political process—that is, by working to elect Democrats or Republicans to office—was entirely fanciful. The very fact that these cases are so obscure, and involved lone citizens of modest means, prevented them from becoming any sort of political issue in an election. How many actual elections will ever turn on the fate of prospective flower arrangers, interior decorators, hair braiders, horse massagers, or casket makers?

In *Restoring the Lost Constitution*, I proposed reversing the presumption of constitutionality in favor of a “presumption of liberty” that would place the burden

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<sup>65</sup> Clark M. Neily III, *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government* (New York: Encounter Books, 2013).

<sup>66</sup> *Id.* at 1–2, 59–60.

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.* at 159–60.

<sup>69</sup> *Id.* at 57–58.

on the government to justify its restriction of liberty.<sup>70</sup> But the lower court opinion in *Lee Optical* shows that who bears the formal burden of proof may be less important for preserving the sovereignty of the people than that courts *realistically* assess the rationality and arbitrariness of laws, even if the legislature is given the benefit of the doubt. While the burden of proof matters—and I still favor the government bearing the burdens of production and persuasion—what matters more is that an individual citizen or company be allowed to meet any burden of proof that may be imposed upon a challenger to a law.

Regardless of who bears the ultimate burden of proof, however, only by empowering the individual to bring suit before an impartial judiciary that will require government regulators to justify their restrictions on liberty as actually rational can these rights be vindicated in practice. Such challenges require that judges be realistic, not formalistic, in skeptically evaluating the rationales proffered by the government for these restrictions.<sup>71</sup>

### Conclusion

In this symposium, *Is the Modern Rational Basis Test Unconstitutional?*, a distinguished group of scholars consider whether it is a good idea to revive some version of traditional rationality review. Some are enthusiastic about a revival,<sup>72</sup> some are merely open to the idea,<sup>73</sup> and some reject it.<sup>74</sup> But all consider it thoughtfully as a serious idea.

Is this an idea whose time has come? Maybe not today, but the numerous lower court cases invalidating irrational and arbitrary laws<sup>75</sup>—notwithstanding the precedent of *Williamson v. Lee Optical*—and Supreme Court cases using some

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<sup>70</sup> BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 33, at 261-71, 347-56.

<sup>71</sup> For more on why “the due process of law” requires general laws that are not irrational or arbitrary, see TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY (Washington, DC: Cato Institute, 2014) 71–155.

<sup>72</sup> See Dana Berliner, *The Federal Rational-Basis Test—Fact and Fiction*, 14 GJLPP \_\_ (forthcoming 2016); Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since Romer v. Evans*, 14 GJLPP \_\_ (forthcoming 2016); Jeffrey D. Jackson, *Classical Rational Basis and the Right to be Free of Arbitrary Legislation*, 14 GJLPP \_\_ (forthcoming 2016); John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 GJLPP \_\_ (forthcoming 2016); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test is Unconstitutional*, 14 GJLPP \_\_ (forthcoming 2016).

<sup>73</sup> Richard Epstein, *Rational Basis Review of FDA Regulation: Why the Two Do Not Mix*, \_\_ GJLPP \_\_ (forthcoming 2016).

<sup>74</sup> Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GJLPP \_\_ (forthcoming 2016); Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GJLPP \_\_ (forthcoming 2016); Erwin Chemerinsky, *The Rational Basis Test is Unconstitutional (and Desirable)*, \_\_ GJLPP \_\_ (forthcoming 2016).

<sup>75</sup> See Dana Berliner, *The Federal Rational-Basis Test—Fact and Fiction*, 14 GJLPP \_\_ (Part IV(C))(forthcoming 2016); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test is Unconstitutional*, 14 GJLPP \_\_ (Part II)(forthcoming 2016).

form of heightened rationality review<sup>76</sup> suggest that such a proposal is not nearly as radical as it may sound.

Indeed, it may simply be rational.

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<sup>76</sup> See Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since Romer v. Evans*, 14 GJLPP \_\_, Part II (forthcoming 2016).